Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-460-95
HAIDAR J
26 MARCH 1997

Civil Procedure *— Contempt of court — Order of commital, application for — Committal proceedings — Non-indorsement of penal notice as required under O 45 r 7(4) of the Rules of the High Court 1980 — Whether the court had discretion to nevertheless enforce the order granting leave to issue committal proceedings if the court was satisfied that the defendant had notice of the order as provided in O 45 r 7(6)(a) or (b) — Whether court should exercise such discretion — Whether defendant had committed contempt by breaching the terms of the consent order made — Rules of the High Court 1980 O 45 r 7(4), 7(6)(a) & (b)*

Copyright *— Video cassettes — Infringement — Renting out of non-pirated videos without licence or permit of owner of copyright — Whether offence committed under ss 36(1) & 13(1) of the Copyright Act 1987*

Words & Phrases *— 'Copies' — Copyright Act 1987 s 13(1)(e)*

On 12 September 1996, a consent order ('the consent order') was recorded before the court which, inter alia, provided that the second defendant and his employees, servants or agents had agreed to restrain from reproducing in any material form or otherwise infringe the first plaintiff's rights to the films entitled 'Putera' and 'Sembilu'. The second plaintiff subsequently commenced committal proceedings against the second defendant. At the hearing of the committal proceedings, the second defendant raised a preliminary objection that there was non-compliance with the requirement in O 45 r 7(4) of the Rules of the High Court 1980 ('the RHC') as there was non-indorsement of the penal notice as set out in Form 87 of the RHC. This non-compliance was not disputed but it was argued that the court had a discretion to nevertheless enforce the consent order under the provisions of O 45 r 7(6) of the RHC as the second defendant had notice of the consent order.

Held, imposing a fine of RM1,000 in default three months' imprisonment on the second defendant:

(1) The court had a discretion to enforce the consent order if the court was satisfied that the second defendant had notice of the order in one of the ways specified in sub-paras (a) and (b) of para 6 of O 45 r 7. In this case, though the consent order was not personally served on the second defendant, the second defendant, having had the benefit of counsel's advice, was deemed to have known of the terms of the consent order. In any event, the second defendant did not deny that he had knowledge of the terms of the consent order. The word 'otherwise' in O 45 r 7(6) of the RHC would be wide enough to cover such a situation

(see pp 215H–216B); *Allport Alfred James v Wong Soon Lam* [1989] 1 MLJ 388, *Sofroniou v Szetti* [1991] FCR 332 and *Nicholls v Nicholls* (1977) 147 NLJ 61 followed; *Iberian Trust Ltd v Founders Trust & Investment Co Ltd* [1932] 2 KB 87, *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381 and *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 not followed.

(2) As the second defendant did not deny that he was in possession of the original tapes, namely 'Putera' and 'Sembilu' and that the tapes were rented without the licence or permit of the second plaintiff, the second defendant had therefore committed an infringement under s 36(1) read with s 13(1)(e) of the Copyright Act 1987 ('the CA 1987'). By the consent order, the second defendant had agreed to restrain from reproducing in any material form or otherwise the films 'Putera' and 'Sembilu'. As the defendant knew or was deemed to have known the terms of the consent order, the second defendant had committed contempt by breaching the terms of the consent order (see p 220B).

Per curiam:

The word 'copies' referred to in s 13(1)(e) of the CA 1987 must necessarily refer to copies lawfully or unlawfully made (see p 219F).

Obiter:

It would seem clear that the legislative intent in enacting s 13(1)(e) of the CA 1987 is to heed the calls for the distribution right as a restrictive act for the copyright owners to participate in this lucrative and expanding industry. It was therefore proper and right for the court to give effect to the legislative intent. If at all s 13(1)(e) would lead to absurdity when read with s 36(2) of the CA 1987, such matters should be addressed and corrected in another forum but not the court (see pp 219I–220A).

[Bahasa Malaysia summary

Pada 12 September 1996, suatu perintah persetujuan ('perintah persetujuan tersebut') telah direkodkan di hadapan mahkamah yang, antara lain, memperuntukkan bahawa defendan kedua dan kakitangan, pekerja ataupun ejennya telah bersetuju supaya tidak menghasil semula dalam sebarang bentuk material ataupun sebaliknya melanggar hak plaintif pertama kepada filem-filem bertajuk 'Putera' dan 'Sembilu'. Defendan kedua kemudiannya telah memohon untuk suatu perintah komital terhadap defendan kedua. Semasa perbicaraan prosiding komital tersebut, defendan kedua telah membangkitkan bantahan permulaan bahawa terdapatnya ketidakpatuhan keperluan A 45 k 7(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana tidak

A ada pengindorsan notis penal seperti yang dinyatakan dalam Borang 87 KMT. Ketidakpatuhan ini tidak dipertikaikan tetapi ianya dihujahkan bahawa mahkamah mempunyai budi bicara untuk menguatkuasakan perintah persetujuan tersebut di bawah peruntukan A 45 k 7(6) KMT kerana defendan kedua telah mempunyai notis perintah persetujuan tersebut.

B

Diputuskan, mengenakan denda sebanyak RM1,000 dan jikalau ingkar penjara selama tiga bulan atas defendan kedua:

(1) Mahkamah mempunyai budi bicara untuk menguatkuasakan perintah persetujuan tersebut jikalau mahkamah berpuas hati bahawa defendan kedua mempunyai notis tentang perintah dalam mana-mana cara seperti yang ditetapkan dalam perenggan kecil (a) dan (b) perenggan 6 A 45 k 7. Dalam kes ini, walaupun perintah persetujuan tersebut tidak disampaikan kepada defendan kedua sendiri, disebabkan defendan kedua telah menerima manfaat nasihat peguamnya, ianya dianggap sebagai telah mengetahui terma perintah persetujuan tersebut. Walau bagaimanapun, defendan kedua telah tidak menafikan bahawa dia mempunyai pengetahuan mengenai terma perintah persetujuan tersebut. Perkataan 'sebaliknya' dalam A 45 k 7(6) KMT adalah cukup luas untuk merangkumi keadaan sebegitu (lihat ms 215H–216B); *Allport Alfred James v Wong Soon Lam* [1989] 1 MLJ 388, *Sofroniou v Szetti* [1991] FCR 332 dan *Nicholls v Nicholls* (1977) 147 NLJ 61 diikut; *Iberian Trust Ltd v Founders Trust & Investment Co Ltd* [1932] 2 KB 87, *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381 dan *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 tidak diikut.

(2) Oleh kerana defendan kedua tidak menafikan bahawa dia memiliki pita-pita asal 'Putera' dan 'Sembilu' dan bahawa pita-pita tersebut telah disewakan tanpa lesen atau kebenaran plaintif kedua, maka defendan kedua telah melakukan pelanggaran di bawah s 36(1) dibaca bersama s 13(1)(e) Akta Hakcipta 1987 ('AH 1987'). Berdasarkan perintah persetujuan tersebut, defendan kedua telah bersetuju untuk menahan diri daripada menghasil semula dalam apa-apa bentuk material ataupun sebaliknya filem-filem 'Putera' dan 'Sembilu'. Oleh kerana defendan tahu ataupun dianggap mengetahui terma perintah persetujuan tersebut, maka defendan kedua telah melakukan penghinaan dengan melanggar terma perintah persetujuan tersebut (lihat ms 220B).

Per curiam:

Perkataan 'salinan' yang dirujuk dalam s 13(1)(e) AH 1987 mestilah merujuk kepada salinan yang teah dibuat secara sah ataupun tidak sah (lihat ms 219F).

Obiter

Adalah jelas bahawa hasrat badan perundangan dalam menggubal s 13(1)(e) AH 1987 adalah untuk menghiraukan seruan hak pengedaran sebagai tindakan terbatas untuk pemilik hakcipta menyertai industri yang semakin maju dn menguntungkan. Maka ianya adalah wajar dan betul untuk mahkamah memberi kesan kepada hasrat badan perundangan. Jikapun s 13(1)(e) membawa maksud yang tak masuk akal bila dibaca bersama s 36(2) AH 1987, perkara-perkara tersebut harus dikemukakan dan dibetulkan dalam forum yang lain dan bukan di mahkamah (lihat ms 219I–220A).]

Notes

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 788–837.

For cases on copyright, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2323–2367.

Cases referred to

Allport Alfred James v Wong Soon Lam [1989] 1 MLJ 388 (folld)

Iberian Trust Ltd v Founders Trust & Investment Co Ltd [1932] 2 KB 87 (not folld)

Leow Seng Huat v Low Mui Yein [1996] 5 MLJ 381 (not folld)

Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239 (not folld)

Nicholls v Nicholls (1977) 147 NLJ 61 (folld)

Sofroniou v Szetti [1991] FCR 332 (folld)

Tin Shi Kian & Anor v Red Rose Restaurant Sdn Bhd [1984] 2 MLJ 313 (refd)

Legislation referred to

Copyright Act 1987 ss 13(1), 36

Rules of the High Court 1980 O 45 r 7(4), (6), O 52 r 2

SG Yeoh (*Wrigglesworth & Co*) for the plaintiffs.

Linda Wong (*Tay & Partners*) for the defendants.

Haidar J: This is an application by the second plaintiff for a committal order against the second defendant, Daljit Singh a/l Chanan Singh (t/a Pusat Video Dalman) (encl 41) for contempt of court for breaching the terms of a consent order dated 12 September 1996 (encl 43).

An ex parte application for leave of the court to issue committal proceedings against the second defendant pursuant to O 52 r 2 of the Rules of the High Court 1980 ('the RHC') was filed by the second plaintiff (encl 40). An order was accordingly granted by the court ('the order').

A At the hearing of the committal proceedings, counsel for the second defendant raised a preliminary issue for the ruling of the court. The preliminary issue relates to non-indorsement of the penal notice as required under O 45 r 7(4) of the RHC as per Form 87.

B *Preliminary issue*

It is not disputed that there was non-compliance of the statutory Form 87 by the second plaintiff and the question was whether the failure to indorse the penal notice therein was fatal to the second plaintiff's application. Counsel for the second defendant relied on *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381, where the learned judge held that failure to insert C the penal indorsement in the order was fatal to the application, citing the cases of *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 and *Iberian Trust Ltd v Founders Trust & Investment Co Ltd* [1932] 2 KB 87 in support thereof.

In the case of *Messrs Hisham, Sobri & Kadir*, the learned judge did D not have the benefit of considering the cases of *Allport Alfred James v Wong Soon Lam* [1989] 1 MLJ 338 and *Sofroniou v Szetti* [1991] FCR 332 which were reported later. However, in respect of *Leow Seng Huat*'s case, the two cases referred to by me were not brought to the attention and consideration of the learned judge. No doubt the two cases are not Malaysian cases but E the wording in our O 45 r 7(4) of the RHC is similar to Singapore's O 45 r 7(4) and the English O 45 r 7(4)(a). In that event, if the two cases were brought to the attention of Hishamuddin J and argued, I have no doubt that the learned judge would have exercised his discretion accordingly. In fact, the Singapore Court of Appeal in the case of *Allport Alfred James* — quoting with approval the English case of *Sofroniou v Szetti* [1991] FCR F 332 in allowing the appeal — said in similar vein, at p 389:

> ... *Sofroniou*'s case was not available to Chao Hick Tin JC at the time when he heard the application for committal. We have no doubt that had this construction been put forward and argued before him, he would most likely have come to the same conclusion as we did and would have exercised his G discretion and made an order for committal against the respondent.

The issue before the Singapore Court of Appeal in *Allport Alfred James* turned on the construction of O 45 r 7(6), which is in pari materia with our O 45 r 7(6). In construing O 45 r 7(6), it is necessary to look at the relevant parts of r 7. The circumstances for the court to invoke its H discretionary power under O 45 r 7(6) are well set out in the judgment of *Allport Alfred James* and in my view it is appropriate therefore for me to set them out in extenso (at pp 387–389):

> The issue in this appeal turned on the construction of O 45 but it is necessary to look at other relevant parts of r 7. First, under r 7(2)(a), an order, and, in this case, the injunction, should not be enforced unless 'a I copy of the order has been served personally on the person required to do or abstain from doing the act in question'. Next, we come to r 7(4), which provides:

'There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served:

(a) in the case of service under para (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and ... .'

The important point to note in this provision is that the penal notice must be indorsed on the copy of the order 'served under this rule' and service under this rule means the personal service under r 7(2)(a). Once these two requirements are complied with, the order may be enforced by an order of committal under O 45 r 5. However, in the case of an order requiring a person to abstain from doing an act, the court, under O 45 r 7(6), is empowered in certain circumstances to enforce the order, notwithstanding that the service of a copy of the order has not been effected in accordance with this rule. Rule 7(6) provides:

'An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either:

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.'

The question is what is meant by the words 'service of a copy of the order has not been effected in accordance with this rule'. The words 'this rule' clearly mean r 7, and service effected in accordance with r 7 means in accordance with r 7(2)(a) and (4), ie service of a copy of the order with the penal notice indorsed on it. It therefore follows that if a copy of the order has not been served personally, eg by registered post, or if it has been served personally but the copy served does not contain the penal notice, then the service of the copy of the order has not been effected 'in accordance with this rule', ie r 7. In such a case, the court has a discretion under r 7(6) to enforce the order if the following condition is satisfied, namely, the person against whom the order sought to be enforced has had notice thereof either:

(a) by being present when the order was made, or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

The recent decision of the English Court of Appeal in *Sofroniou v Szetti* is a clear authority for the construction we have placed on r 7(6). In that case, a copy of the order was personally served on the person requiring him to abstain from doing certain acts, but it did not contain a penal notice as prescribed by r 7(4) of the English Rules of Supreme Court ('the RSC') (O 45 r 7 of the RSC is in pari materia with our O 45 r 7). It was held that the service of the copy was not effected in accordance with r 7, and accordingly under r 7(6), the court has a discretion to enforce the order by an order of committal against the contemner. McCowan LJ in his judgment said at pp 333–334:

'Mr Denman, for the respondent, on the other hand, submits that the service being referred to in para (6) is service which has not been

A effected in accordance with "this rule", which includes service of a copy which is not indorsed with a penal notice. The appellant, he argues, is and was at all material times a person who had notice of the terms of the order, not by telephone or telegram, but "otherwise", namely by service of the order, which, despite the absence of the penal notice, did contain the terms of the order.

B In my judgment, Mr Denman's interpretation is the right one. Protection is provided for the person against who it is sought to enforce the order by the words in para (6) "may be enforced".'

Neil LJ said, at p 334:

'It is clear from the terms of RSC O 45 r 7(4)(a) that in order to comply C with the rules, any copy of a prohibitory order which is served must be indorsed with a penal notice. Having regard to the earlier practice, however, I am satisfied that O 45 r 7(6) should be construed in accordance with the submission put forward by counsel for the respondent. The court is given a discretion to enforce the order notwithstanding that service has not been effected in accordance with D r 7 (which includes the requirement that the order should be indorsed as provided in para (4)(a) if the court is satisfied that the person concerned had notice of the order in one of the ways specified in sub-paras (a) and (b) of para (6).'

I now revert to the facts of this case. It is not disputed that the order was E made in the absence of the second defendant but in the presence of his counsel and it was not personally served on the second defendant. Further, the order was drafted by counsel for the second defendant and the fair copy had not been extracted even by the date of the hearing of these committal proceedings. It is also not disputed that the copy of the order did not contain the penal notice as required under r 7(4).

F It is observed that at the leave stage of the application for an order of committal before the learned judicial commissioner, counsel for the second plaintiff orally asked for dispensation of personal service as against the second defendant on the ground that he was represented by solicitor and an order was accordingly granted with the further order that service of the G notice of motion together with the statement and the affidavit in support be served on Tay & Partners (the second defendant's solicitors) be deemed to be good service on the second defendant's solicitors).

In this case, though the order was not personally served on the second defendant, I am satisfied that the second defendant — having had H the benefits of counsel's advice — is deemed to know of the terms of the order. In any event, the second defendant did not deny that he had knowledge of the terms of the order. The word 'otherwise' in r 7(6) would be wide enough to cover this situation. In the circumstances, the conditions under r 7(6) would have been satisfied though the order did not contain the penal notice required under r 7(4). Though the service of the copy of I the order had not been 'effected in accordance' with r 7 — as I said earlier — the second defendant had full knowledge of the terms of the order and the order was for the second defendant to abstain from doing certain acts. In other words, the court has a discretion to enforce the order if the court was satisfied that the second defendant had notice of the order in one of

the ways specified in sub-paras (a) and (b) of para 6 of O 45 r 7 of the RHC. I am so satisfied. A

In the circumstances I am of the view that, following *Allport Alfred James*, which cited with approval the English case of *Sofroniou*, the defect in not complying with the indorsement of the penal notice is not fatal so long as the second defendant had knowledge of the terms of the order. It has been brought to my attention recently the English Court of Appeal case of *Nicholls v Nicholls* (1977) 147 NLJ 61, where the court reviewed the previous authorities on the subject of procedural irregularities either in the application to commit or in the committal order. Under the caption 'The Result of the Appeal', the Court of Appeal provided guidance for future cases as follows: B C

1 As committal orders involve the liberty of the subject, it is particularly important that the relevant rules are duly complied with. It remains the responsibility of the judge when signing the committal order to ensure that it is properly drawn and that it adequately particularises the breaches which have been proved and for which the sentence has been imposed. D

2 As long as the contemnor had a fair trial and the order has been made on valid grounds, the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except insofar as the interests of justice require this to be done.

3 Interests of justice will not require an order to be set aside where there is no prejudice caused as a result of errors in the application to commit or in the order to commit. When necessary the order can be amended. E

4 When considering whether to set aside the order, the court should have regard to the interests of any other party and the need to uphold the reputation of the justice system. F

5 If there has been a procedural irregularity or some other defect in the conduct of the proceedings which has occasioned injustice, the court will consider exercising its power to order a new trial unless there are circumstances which indicate that it would not be just to do so.

In the circumstances, on the facts of this case the court, in my opinion, can and should rightly invoke its powers under r 7(6) and I do so accordingly. The defect in the order — that is, the failure to indorse the penal notice therein — is not fatally flawed. As I said earlier, the second defendant knew or is deemed to have known of the terms of the order and hence no prejudice is thereby caused to him for such irregularity. G

I then ordered counsel to address me on the substantive matter, that is, the committal proceedings. H

The relevant portion of the order (encl 43) is as follows:

1 The second defendant acknowledges that:

... the second plaintiff is the assignee of the films entitled 'Putera' and 'Sembilu' and pursuant to the acknowledgement given in sub-paras ... above, the second defendant whether by himself, his employees, servants or agents agree to restrain: ... I

A (d) from reproducing in any material form or otherwise infringe the first plaintiff's rights to the films entitled 'Putera' and 'Sembilu'; ... .

The second plaintiff contended that the second defendant has breached the terms of the order by the following acts:

B *'Putera'*

On 3 October 1996, a raid was conducted at Pusat Video Dalman, the second defendant's premises, and a 'Putera' tape was seized.

Rashidy bin Abdul Rahman in his affidavit (encl 35) affirmed at:

C (i) para 5 that a 'Putera' tape was seized from Pusat Video Dalman;

(ii) para 6 that the 'Putera' tape seized was marked 'not for sale or rental'; and

(iii) para 6 that the second defendant admitted that he had purchased the 'Putera' tape for rental purposes.

D Tahir bin Puteh in his affidavit (encl 38) affirmed that the 'Putera' tape was seized and the tape is marked 'not for rental'.

Tin Sin Koi in his affidavit (encl 37) affirmed at:

(i) para 4 that the second defendant has no licence or any right in the E 'Putera' tape;

(ii) para 6 that the second defendant has no licence or any right to offer the 'Putera' tape for rental.

The second defendant by his affidavit (encl 45) at paras 2 and 3 admitted that all the tapes for rent in his shop are original tapes and would therefore F include the 'Putera' tape.

'Sembilu'

On 17 September 1996, he had rented or caused to be rented to one Norzaily bin Mohd Nor, a video tape entitled 'Sembilu' which had been G reproduced without the consent of the second plaintiff. In support thereof, by way of the affidavit of Norzaily bin Mohd Noor (encl 36), the rental card of the 'Sembilu' tape is exhibited as exh N2.

Tin Sin Koi in his affidavit (encl 37) affirmed at:

(i) para 4 that the second defendant has no licence or any right in the H 'Sembilu' tape; and

(ii) para 5 that the second defendant has no licence or any right to offer the 'Sembilu' tape for rental.

The second defendant in his affidavit (encl 45) affirmed at para 2 that any tape of 'Sembilu' rented by his shop would be original tapes. I

It is not disputed that the second plaintiff is the assignee of the films entitled 'Putera' and 'Sembilu' which assignment was given by the first plaintiff who had the rights to the said films.

The issue is whether the second defendant, his employees, servants or agents has breached para 1(d) of the order, namely: A

> by reproducing in any material form or otherwise infringe the first plaintiff's rights to the films entitled 'Putera' and 'Sembilu'.

In respect of the claim of Tin Sin Koi in para 3 of his affidavit (encl 37) that the 'Sembilu' tape was reproduced without the licence of the plaintiffs, it is a bare statement without supporting evidence as to how he came to such a conclusion. The second defendant in his affidavit (encl 45) affirmed that the 'Sembilu' tape was an original copy and not a reproduced one. In a civil contempt case, proof must be proof beyond all reasonable doubt (see *Tin Shi Kian & Anor v Red Rose Restaurant Sdn Bhd* [1984] 2 MLJ 313). In the premises, I would go on the basis that it is common ground that the tape 'Sembilu' is an original tape. B C

Law

There are two parts to infringement of copyright under s 36 of our Copyright Act 1987 ('the CA 1987'), namely, local and imported articles. D

Section 36 reads:

> (1) Copyright is infringed by any person who does, or cause any other person to do, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act. E
>
> (2) Copyright is infringed by any person who, without the consent or licence of the owner of the copyright, *imports* an article into Malaysia for the purpose of:
>
> (a) selling, letting for hire, or by way of trade, offering or exposing for sale or hire, the article; F
>
> (b) distributing the article:
>
> (i) for the purpose of trade; or
>
> (ii) for any other purpose to an extent that it will affect prejudicially the owner of the copyright; or
>
> (c) by way of trade, exhibiting the article in public, G
>
> where he knows or ought reasonably to know that the making of the article was carried out without the consent or licence of the owner of the copyright. (Emphasis added.)

We are concerned with s 36(1) of the CA 1987.

An act the doing of which is controlled by copyright under the CA 1987 is provided by s 13(1). In so far as is relevant to this case, the second plaintiff relied on s 13(1)(e) of the CA 1987, which is: H

> 13 Nature of copyright in literary, musical or artistic works, films and sound recordings
>
> (1) Copyright in a literary, musical or artistic work, a film or a sound recording shall be the exclusive right to control in Malaysia: I
>
> (e) the distribution of the copies of the work to the public by sale, rental, lease or lending.

Counsel for the second defendant submitted to the court to consider, by analogy, that it would appear that parallel imports — which may be defined as articles which are lawfully manufactured overseas but imported by a person other than the copyright or right holder in the country of import — are not caught by s 36(2) of the CA 1987, by referring to the UK legislation as well as the Australian legislation on copyright. In that event, she was of the view that the court should read s 13(1)(e) in that light, otherwise it would lead to absurdity (see p 128 of *Copyright Law in Malaysia* by Khaw Lake Tee (1994)). According to the learned author at p 130:

> Assuming that the right of distribution is not exhausted, the effect would be to render the legislative intention of permitting paralleled imports nugatory. While on the one hand, parallel imports are not prohibited by s 36(2), on the other, the sale or other commercial dealings in respect of such parallel imports may be forbidden by reason of s 13(1)(e).

Counsel for the second plaintiff submitted that even in the UK legislation, there are exceptions — for example, in respect of sound recording, films and computer programmes in respect of the distribution right. According to her, even assuming that parallel imports under s 36(2) of the CA 1987 are allowed, it would be wrong to consider it favourably with s 13(1)(e). She contended that the provisions of s 13(1)(e) are clear and to construe otherwise would open the floodgates if consent of the copyright holder is not necessary or it is exhausted.

I observe that counsel for the second defendant would appear to have conceded that her reliance on the UK legislation on the parallel imports provision is not to use it for the purpose of interpretation of s 13(1)(e) of the CA 1987, but purely for a better understanding of the issue raised. It may well be good to have a better understanding of the issue raised but it is not relevant to the issue before me as we are here dealing with the interpretation of s 36(1) (not s 36(2)) read with s 13(1)(e) of the Act. The word 'copies' referred to in s 13(1)(e) must necessarily refers to copies lawfully or unlawfully made.

Even the learned author of *Copyright Law in Malaysia* referred to by me, seemed to hold the view that under the CA 1987, the distribution right is not exhausted even after a sale, thus entitling the right holder to control not only the rental but the resale of the copies of his work (see p 102). According to the learned author on the same page:

> Not surprisingly, the growth of the rental industry soon led to calls for a right for the copyright owners to participate in this lucrative and expanding industry. In Malaysia, these calls were heeded when the distribution right was included for the first time as a restricted act under the CA 1987.

It would seem clear to me that the legislative intent in enacting s 13(1)(e) is to heed the calls for the distribution right as a restrictive act for the copyright owners to participate in this lucrative and expanding industry. In my view, it is therefore proper and right for the court to give effect to the legislative intent. If at all s 13(1)(e) would to lead to absurdity, as contended by counsel for the second defendant, when read with s 36(2) of the CA 1987, such matter should be addressed and corrected in another

forum but not the court. I would reiterate that we are here dealing with the interpretation of s 13(1)(e) read with s 36(1), and not s 36(2) of the CA 1987.

As the second defendant did not deny that he was in possession of the original tapes 'Putera' and 'Sembilu' and they were rented without the licence or permit of the second plaintiff, the assignee of the rights to the said tapes, he had committed an infringement under s 36(1) read with s 13(1)(e) of the CA 1987. By para 1(d) of the order, the second defendant, whether by himself, his employees, servants or agents agreed to restrain from reproducing in any material form or otherwise the films 'Putera' and 'Sembilu'.

As the second defendant knew or was deemed to have known of the terms of the order, clearly on the evidence before me, I find the second defendant has committed contempt by breaching the terms of the order.

I will now invite counsel for the second defendant to address the court in respect of the committal order that I should make against the second defendant.

After hearing counsel for the second defendant and the second defendant himself as to the order that I should make, I consider that a fine would be appropriate in the circumstances of the case and I impose a fine of RM1,000 in default three months' imprisonment on the second defendant.

Order accordingly.

Reported by Lew Chee Seong